In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1584

GREYHOUND LINES, INC.,

Petitioner,

vs.

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO
and
THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OWEN JAMESON
DAVID M. HEILBRON
RICHARD C. BRAUTIGAM
McCUTCHEN, DOYLE, BROWN & ENERSEN
601 California Street
San Francisco, California 94108
Telephone: (415) 981-3400
Attorneys for Petitioner
Greyhound Lines, Inc.

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Petitioner respectfully prays that this Court grant a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit. The judgment affirmed the issuance of a preliminary injunction in an arbitrable labor dispute.

OPINIONS BELOW

The opinion of the District Court (Appendix A, below, pp. 1-11) is neither officially nor unofficially reported. The

opinion of the Court of Appeals (Appendix B, below, pp. 12-22) is unofficially reported at 78 C.C.H. Lab. Cases ¶ 11,253. It has not yet been officially reported.

JURISDICTION

The Judgment of the Ninth Circuit Court of Appeals was entered on January 30, 1976. Section 1254(1) of Title 28 of the United States Code grants this Court jurisdiction to review that Judgment by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) ("Section 301"), gives the district courts of the United States jurisdiction to hear actions "for violation of contracts between an employer and a labor organization . . . ."

This Petition asks this Court to resolve issues with respect to whether, when and how far the federal judiciary may intrude itself into the settlement of arbitrable labor disputes. Those basic labor law issues have never been before this Court in the context in which this case presents them.

Here the union asserted that the parties' collective bargaining agreement prohibited action which the employer said it was going to take. The dispute was arbitrable under the collective bargaining agreement. The employer agreed to arbitrate, but did not agree to maintain the status quo pending arbitration. The union filed suit under Section 301 and obtained a preliminary injunction restraining the employer from taking the action pending the arbitrator's decision. The questions raised are these:

1. May a district court intervene in a labor dispute and issue a preliminary injunction which enjoins an employer

from taking action pending arbitration where the employer has done everything it promised to do to resolve the dispute and the preliminary injunction is not necessary to preserve the arbitrator's jurisdiction or ability to resolve the dispute?

2. In light of the controlling principle established by the *Steelworkers' Trilogy*[1] that the interpretation and application of collective bargaining agreements is for the arbitrator and not for the courts, may a district court in effect add terms to the agreement and then enjoin the employer from violating the terms it—not the arbitrator—added? The decision of the Ninth Circuit in this case approves such judicial intervention, and it is necessarily in conflict with the opinion of the Sixth Circuit in *Detroit News Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

3. May a district court enjoin an employer from taking certain action pending arbitration and thereby grant preliminarily the very relief which only the arbitrator could grant permanently when there is no showing or finding that the union has a likelihood of success on the merits before the arbitrator? The Second Circuit has held "no." *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). The Ninth Circuit held "yes" in this case.

4. May a district court issue a preliminary injunction restraining an employer from taking action pending arbitration without making the injunction bond payable upon the union's losing on the merits before the arbitrator?

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1. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

STATUTES INVOLVED

The statutes involved in this Petition are Sections 203 (d) and 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 173(d) and 185(a), 61 Stat. 154, 156. The official text of the pertinent provisions follows:

> *Section 203(d):* "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."
>
> *Section 301(a):* "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Northern District of California under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, ("Section 301"). Jurisdiction in the district court was based upon Section 301 and upon 28 U.S.C. § 1337. This action is not, however, an ordinary Section 301 suit to compel arbitration, for the employer was willing to arbitrate. It is a suit to enjoin an employer from acting pending arbitration.

The employer is Greyhound Lines, Inc. ("Greyhound" or the "Company"). It is a national corporation and is an employer in an industry affecting commerce within the meaning of Sections 2(2) and 2(7) of the Labor-Management Relations Act of 1947 (the "Act"), 29 U.S.C. § 152(2) and (7). (App. A, p. 2) The plaintiffs are Amalgamated

Transit Union, Division 1384, AFL-CIO, and The Amalgamated Council of Greyhound Divisions, AFL-CIO. Division 1384 represents Greyhound bus drivers in the Vancouver-Portland area and the Council represents all Greyhound bus drivers. Both the Division and the Council are labor organizations within the meaning of Section 2(5) of the Act, 29 U.S.C. § 152(5). (App. A, p. 2) Division 1384 and the Council are referred to in this Petition collectively as "the Union".

Greyhound and the Union have been parties to a series of collective bargaining agreements for many years. The current collective bargaining agreement (the "Agreement") contains provisions which govern the resolution of disputes arising from the Agreement. Specifically, the Agreement prohibits the Union from striking and prohibits the Company from engaging in a lockout. The Agreement also provides for the resolution of disputes by binding arbitration. (App. A, p. 2) There is no provision which requires Greyhound to maintain the status quo pending arbitration where it takes action which the Union contends violates the Agreement.

On April 17, 1975, the Company notified the Union that it was going to change the work cycles on bus runs from Vancouver to Seattle and Seattle to Portland from six days on, three days off and four days on, three days off, respectively, to five days on, two days off. The change was to be effective June 25. (App. A, pp. 2-3; App. B, p. 13)

The Union protested the change and contended that the Agreement prohibited the Company from making the change without the Union's consent. The Company contended that it had a perfect right under the collective bargaining agreement to make that change. The Union asked the Company to arbitrate the dispute immediately and,

pending arbitration, to maintain the status quo. The Company agreed to immediate arbitration and named the Company's arbitrator. It declined to maintain the status quo pending arbitration. (App. A, p. 3; App. B, p. 13) Rather than taking the Company up on its offer to conduct immediate arbitration, the Union filed this proceeding on June 2, 1975. (App. B, p. 13)

The complaint sought to enjoin the implementation of the new 5-2 run cycle pending arbitration, and the Union moved for a preliminary injunction. The District Court set the matter for an evidentiary hearing on June 17, 1975. At the outset of the June 17 hearing, the District Court ruled that the question whether the Union had a reasonable likelihood of success on the merits before the arbitrator was irrelevant, and accordingly ruled that no evidence was to be introduced upon that issue.

The matter was argued on June 19. At that argument the Court expressed its opinion that the Union's showing of irreparable injury was "flimsy at best". Then on June 20 the Court issued its Order granting a preliminary injunction prohibiting Greyhound from changing the "present weekly work cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement." (App. A, p. 10)

In issuing that injunction the District Court did not find that Greyhound's refusal to refrain from making the run changes pending arbitration violated the Agreement; there was nothing before the Court from which it could have so found. Moreover, the District Court did not find that issuance of the preliminary injunction was necessary to preserve the jurisdiction or ability of the arbitrator to resolve the dispute; there was nothing before the Court from which it could have so found. Finally, the District

Court did not find that the Union had a likelihood of success before the arbitrator; there was nothing before the Court from which it could have found that either.[2]

The Order provided that the Union should file a $10,000 bond for "payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction." (App. A, p. 10) Greyhound moved for an order to require the bond to cover attorneys' fees in accordance with the specific provisions of the Norris-LaGuardia Act, 29 U.S.C. § 107, and to require that the bond be conditioned so that it was payable upon the arbitrator awarding in favor of Greyhound. On June 30, 1975 the Court issued its Order raising the amount of the bond by $5,000 and denying Greyhound's motion with respect to the bond in all other respects. (App. B, p. 15)

The Ninth Circuit affirmed the District Court's orders.[3]

With respect to the preliminary injunction, the Ninth Circuit properly recognized that this Court's decisions in the *Steelworkers' Trilogy* and *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), among others, establish that labor disputes are to be resolved by arbitration; that therefore the federal judiciary is not to intrude itself into them; and that those rules are at the central core of the national labor relations policy. Then it concluded that a

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2. The District Court did find that the Union's position before the arbitrator was "not plainly without merit." (App. A, p. 6) That, however, was not the proper test to apply and, since all evidence going to the merits had been ruled out, there was nothing before the Court from which it could properly make that finding anyway.

3. It did hold that the District Court erred in failing to include attorneys' fees in the coverage of the bond but concluded that Greyhound had not been injured by that error. (App. B, p. 22)

district court may adopt standards for the issuance of a preliminary injunction in an arbitrable labor dispute which are lower—not higher—than those which are required in other contexts. (App. B, pp. 17-18) Like the District Court, the Ninth Circuit did not concern itself with whether the failure of Greyhound to maintain the status quo pending arbitration violated some provision of the collective bargaining agreement; similarly, it did not address the issue of the absence of any finding or showing that the preliminary injunction was necessary to preserve the jurisdiction or ability of the arbitrator to resolve the dispute. The Ninth Circuit essentially affirmed the District Court's holding that no likelihood of success before the arbitrator need be shown, for it ruled that one "need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor" to obtain a preliminary injunction which grants pending arbitration the very relief which only the arbitrator can grant permanently. (App. B, p. 18)

With respect to the conditioning of the bond, the Ninth Circuit held that the District Court was correct in refusing to condition the bond to call for payment upon the Union's losing before the arbitrator. It reasoned that to hold otherwise "would fly in the face of our earlier holding that a showing by the plaintiff of probable success is not necessary . . . ." (App. B, p. 22)

Thus the opinion of the Court of Appeals establishes these untenable propositions: *One* An employer who has done everything he promised to do to resolve a labor dispute may nevertheless be enjoined from taking the action which is the subject of that dispute pending arbitration notwithstanding the facts that there is no violation of the contract to enjoin; that the injunction is not necessary to preserve

the jurisdiction or ability of the arbitrator to resolve the dispute; and that the union has not shown any likelihood of success before the arbitrator. *Two* Thereafter, the union may lose before the arbitrator and leave the employer with no recourse on the injunction bond for the damages suffered by being restrained from taking the action which it had a perfect right to take.

The obvious unfairness of that result is not academic here, for it is exactly what happened in this case. Greyhound prevailed in the arbitration and now finds itself without recourse on the bond for the damages it suffered while this injunction stopped it from doing what it had a perfect right to do.

Besides being unfair, the principle established by the Ninth Circuit is contrary to Section 301 and to the controlling principles of labor law as announced by this Court. Accordingly, Greyhound petitions this Court to review the Judgment of the Ninth Circuit by writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Petition raises issues with respect to the circumstances under which a district court may restrain an employer in an arbitrable labor dispute from taking action pending arbitration. Although this Court has given particular attention to the relationship of the federal judiciary to the labor arbitration process,[4] it has never before directly passed upon these issues. The issues present important questions as to whether, when and to what extent the federal

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4. *E.g., Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368 (1974); *Local 150, Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487 (1972); *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970); The *Steelworkers' Trilogy,* 363 U.S. 564, 574, 593 (1970); *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957).

judiciary may intrude itself into labor disputes, and these issues have not been, but should be, settled by this Court. Moreover, suits by unions to require employers to maintain the status quo pending arbitration have become increasingly frequent in recent years,[5] and therefore it is particularly appropriate that this Court now provide guidance to the lower courts as to when, if ever, such injunctions should issue.

Moreover, the Court of Appeals decided those important federal questions contrary to the applicable labor law principles established by this Court and contrary to sound labor law policy. The Ninth Circuit lowered the barriers to obtaining injunctive relief in an arbitral labor dispute and then held that a union which loses on the merits is not liable on the bond. If that decision is permitted to stand, there will be virtually no restraint on a union's seeking a preliminary injunction over an arbitrable labor dispute every time an employer takes some action the union does not like. That is so because such injunctions will be easy to obtain and because they can be obtained with impunity. The results would be that unions could routinely prevent management from managing regardless of the merits of the dispute, and that the Courts would routinely intrude themselves into those disputes.

Finally, the opinion of the Ninth Circuit in this case is in conflict with the opinion of the Second Circuit in *Hoh v. Pepsico, Inc.*, 491 F.2d 556 (2d Cir. 1974), and is in conflict with the opinion of the Sixth Circuit in *Detroit News. Pub. Ass'n. v. Detroit Typo. Union No. 18*, 471 F.2d 372 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

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5. *E.g., Hoh v. Pepsico, Inc.*, 491 F.2d 556 (2d Cir. 1974); *Pittsburgh News. Print. Press. Union No. 9 v. Pittsburgh Press Co.*, 479 F.2d 607 (3d Cir. 1973).

The Ninth Circuit interprets the *Steelworkers' Trilogy* to require courts to lower the barriers to the granting of injunctive relief in cases such as this one. (App. B, pp. 17-18) The Second Circuit has ruled that the *Trilogy* requires courts to "continue to exercise the sound discretion of the chancellor" in such cases. *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). The Ninth Circuit affirmed what was in effect the judicial implication and enforcement of a promise by Greyhound to maintain the status quo pending arbitration. The Sixth Circuit has held that under the *Steelworkers' Trilogy* even an express promise by an employer to maintain the status quo pending arbitration cannot be enforced by the courts but must be left to the arbitrator. *Detroit News. Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872, 875 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). Since the *Steelworkers' Trilogy* forms the primary source of the principles which govern the relationship between courts and arbitrators, it is important for this Court to resolve these conflicting interpretations of it.

A. A District Court Can Not Issue a Preliminary Injunction Where There Is No Wrong to Enjoin and Where the Arbitral Process Is Working By Itself.

Section 301(a) grants the district courts jurisdiction to hear suits "for violation" of labor contracts. Therefore, any injunction which issues by virtue of that authority must be based upon some violation of a labor contract and can be directed against only that action which would constitute the violation. This is established by Section 301 itself and by the decisions of this Court.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), for example, this Court declared that a party could not be ordered to arbitrate a dispute

unless the court first found that the party's refusal to arbitrate was in violation of the labor contract, 363 U.S. at 582. *Accord, John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-47 (1964); *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241 (1962). Similarly, a union cannot be enjoined from striking unless it is first found that the strike is in violation of the union's contractual duty not to strike. *E.g., Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 380 (1974).

Here the District Court enjoined Greyhound from changing the work cycle on the Vancouver-Seattle and the Seattle-Portland bus runs pending the arbitrator's decision. Neither the District Court nor the Court of Appeals concluded that Greyhound's decision not to maintain the status quo violated the collective bargaining agreement (App. A; App. B). There is no basis upon which such a conclusion could have been made, and therefore the preliminary injunction lacked its necessary jurisdictional basis.

To begin with, the Agreement does not obligate Greyhound to maintain the status quo pending arbitration; nowhere did Greyhound promise to do so. What Greyhound did promise to do was to process disputes through arbitration. (App. A, p. 2) Since Greyhound was ready to keep that promise (App. A, p. 3; App. B, p. 13), it had done everything it promised to do to resolve the dispute and there was no wrong to enjoin it from doing. Fundamental equitable principles as well as the specific words of Section 301 dictate that an injunction cannot issue where there is no wrong or "violation" to enjoin.

Moreover, the preliminary injunction issued here was not necessary to preserve the jurisdiction or ability of the arbitrator to resolve the dispute and therefore it improperly intruded the court into the arbitral process.

Congress has declared that the preferred method for the settlement of labor disputes is "[f]inal adjustment by a method agreed upon by the parties . . . ." Section 203(d) of the Act, 29 U.S.C. § 173(d). Ever since the *Steelworkers' Trilogy* this Court has made it clear that "[t]hat policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining is given full play." *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 566 (1960). The teaching of the *Steelworkers' Trilogy* is that where the parties have agreed to submit a dispute to arbitration, "the function of the court is very limited." *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567 (1960). "The judiciary sits . . . to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 585, (1960). The arbitrator "sit[s] to settle disputes." *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596 (1960).

A party who refuses to arbitrate a dispute he promised to arbitrate may be ordered to arbitrate. In such a situation the reluctant party has violated the dispute resolution provisions of the collective bargaining agreement, and judicial intervention is necessary to make the arbitral process work. *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). Similarly, where a party faced with an arbitrable dispute tries to thwart the arbitral process by force or by acting in such a way as to render the arbitrator's decision futile, he has in effect violated his promise to arbitrate because he has made it impossible for the arbitral process to work. Here, too, the judiciary may intervene. *Boys*

Markets v. Retail Clerks Union, 398 U.S. 235, 253-54 (1970); *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.,* 363 U.S. 528 (1960).

However, the *Steelworkers Trilogy* and other decisions of this Court establish the principle that a court may not intervene in an arbitrable labor dispute where its intervention is not necessary to make the arbitral process work. That is so because the parties bargained for a decision by the arbitrator. Where the arbitral process is working by itself and the arbitrator has the jurisdiction and ability to settle the dispute, there is no need for the courts to intervene and therefore the courts should stay out of it.

Thus in *Boys Markets v. Retail Clerks Union,* 398 U.S. 235 (1970) this Court held that a district court may enjoin a violation of a no-strike clause where the strike is over an arbitral dispute. In *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,* 370 U.S. 254 (1962), this Court held that a district court may not entertain an action for damages for violation of a no-strike clause which is also an arbitrable dispute. In the first case an injunction was required to make the arbitral process work, because the strike thwarted that process; therefore the judiciary could intervene. In the second there was no need for judicial involvement since the arbitral process was working by itself; therefore the judiciary could not intervene.

This Court reached a similar result in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.,* 363 U.S. 528 (1960), a case brought under the Railway Labor Act, 45 U.S.C. § 151 et seq. That case holds that a court may condition the issuance of an injunction against a strike upon an employer's maintaining the status quo pending arbitration, but only where that condition is necessary "to preserve

the jurisdiction of the [Arbitrator]. . . ."[6] That is, where absent the condition, "a decision of the . . . . [Arbitrator] in the unions' favor would be but an empty victory." 363 U.S. at 534. *Accord, Local Lodge 2144 v. Railway Express Agency, Inc.,* 409 F.2d 312, 318 (2d Cir. 1969); *Westchester Lodge 2186 v. Railway Express Agency, Inc.,* 329 F.2d 748, 753 (2d Cir. 1964); *Local 757 v. Budd Co.,* 345 F. Supp. 42, 47 (E.D. Pa. 1972) (a Section 301 case). More recently, this Court held that a union may be enjoined from striking when it has not performed its statutory duty to "exert every reasonable effort to make and maintain agreements . . . ."[7] but only where "such a remedy is the only practical, effective means of enforcing the duty . . . ." *Chicago & N.W. Ry. v. United Transportation Union,* 402 U.S. 570, 583 (1971).

These cases underscore and illustrate the "very limited" role which courts may play in resolving labor disputes. The principle they lay down is that an employer may not be restrained from taking disputed action pending arbitration except where such an injunction is necessary "to preserve the jurisdiction" of the arbitrator, and then only when that remedy is the "only practical, effective means" of insuring that the exercise of that jurisdiction will not be "futile."

That is hardly this case. Had Greyhound put the new runs into effect and had the arbitrator ruled for the Union (he did not), the arbitrator could simply have ordered Greyhound to put the old runs back into effect, and Greyhound could have done that. All that would have happened in the meantime is that the drivers would have had to work for five days a week for pay. An arbitrator can provide

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6. The Adjustment Board is the arbitrator.

7. Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First.

a remedy for an injury like that, if it be an injury—for example, by awarding overtime for the fifth day or by awarding extra vacation days. The fact that the Union in this case apparently preferred some other remedy is beside the point. The Union bargained for a remedy fashioned by the arbitrator and so long as that remedy is effective, a court must "hold the . . . . [Union] to its bargain." *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,* 370 U.S. 254, 266 (1962). See *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599 (1960).

Accordingly, the issuance of this preliminary injunction was directly contrary to the labor law principles as set forth by this Court. The employer was willing and ready to arbitrate the dispute; had therefore done everything he promised to do; and there was no wrong—or Section 301 "violation"—to enjoin him from doing. Moreover, the arbitral process was working by itself; the injunction was not necessary to preserve the jurisdiction or ability of the arbitrator to fashion an appropriate remedy; and there was no need for the judiciary to become involved in the dispute.

This is the first court of appeals decision affirming the issuance of a preliminary injunction against an employer in a situation such as that, and for that reason alone this is an important case. But in recent years several district courts have similarly overstepped the limitations which Congress and the principles behind the decisions of this Court have placed on them.[8] If the decision of the Ninth

8. For example, in *Letter Carriers v. U.S. Postal Service,* 88 LRRM 2678 (S.D. Ia. 1975), the district court enjoined the postal service from eliminating a ten-minute wash-up period pending arbitration although the parties were willing to and in fact were in the process of arbitrating the dispute.

Circuit is permitted to stand, this increasing judicial overactivity in arbitrable labor disputes can only be encouraged.

The principles which this Court has laid down and with which the Ninth Circuit's opinion is apparently in conflict have never been applied by this Court in a case such as this. Such a case has in fact never been before this Court. The lower courts need guidance as to how those principles are to be applied in such a case. Therefore this Court should grant the Petition with respect to the first Question Presented.

B. A District Court Can Not Issue a Preliminary Injunction to Restrain an Employer from Violating Terms Which the Court —Not the Arbitrator—Has Implied Into the Collective Bargaining Agreement.

This is not a case in which the issuance of a preliminary injunction was necessary to preserve the jurisdiction or ability of the arbitrator to resolve an arbitral labor dispute. (Part A, above) This is also not a case in which an employer violated a promise to maintain the status quo pending arbitration, for Greyhound never promised to do that. Thus there was neither a justifiable labor law reason for the injunction nor any wrong against which the injunction might properly issue. The injunction which issued rewrote the parties' Agreement by adding new terms to it to which neither party had agreed. In effect, the District Court implied a promise by Greyhound to maintain the status quo pending arbitration and then enjoined Greyhound from violating the promise which it—not the arbitrator—had implied.

That is directly contrary to the controlling labor law principles set forth in the *Steelworkers' Trilogy.* In the *Steelworkers' Triology* this Court held that "the question

of interpretation of the collective bargaining agreement is a question for the arbitrator;" and that "the courts have no business" becoming involved in making such interpretations. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

> "[I]n the *Steelworkers Trilogy* we emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 242-43 (1970).

Moreover, there is nothing in this Agreement from which to imply the new term the District Court implied. Nor is there anything in the general body of labor law from which to imply that new term, because the "quid pro quo" for a no-strike clause is an employer's promise "to submit grievance disputes to the process of arbitration." *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 248 (1970); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957). Therefore, if any such term is to be implied into that Agreement it must be implied from "the industrial common law—the practices of the industry and the shop." Since only the arbitrator has the expertise and authority to interpret and apply that "industrial common law," *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581-82 (1960), only the arbitrator can imply any promise based upon it. The decision of the lower courts judicially to imply that promise improperly intruded them into the arbitrator's role and violated the command of the *Trilogy*.

Finally, the decision below is necessarily in conflict with the Sixth Circuit's opinion in *Detroit News. Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). There the Sixth Circuit

held that an express promise by an employer to maintain the status quo pending arbitration should not be construed and enforced by the courts, but should be left to the arbitrator. 471 F.2d at 875. Here the Ninth Circuit not only permitted the District Court in effect to imply such a promise but also permitted the District Court to construe and enforce that implied promise by enjoining a "violation" of it.

This Court should grant the Petition with respect to the second Question Presented to correct the lower court's departure from this Court's prior decisions and to resolve the conflict between the Ninth and Sixth Circuits.[9]

C. A District Court Can Not Issue a Preliminary Injunction Without Requiring a Showing That the Union Has a Likelihood of Success Before the Arbitrator.

Greyhound's action about which the Union complained was the change in the work cycle on the Vancouver-Seattle and the Seattle-Portland bus runs from 6-3 and 4-3, respectively, to 5-2. The Union sought from the arbitrator a ruling that the Company could not make the change and that the old work cycle had to continue in effect. The Union sought and obtained from the District Court a preliminary injunction which held, pending arbitration, that the Company could not make the change and that the old work cycle had to continue in effect. Therefore, the District

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9. The Ninth Circuit's decision also constitutes bad labor policy for yet another reason: Its effect is to grant the Union the right to stop Greyhound from taking action pending arbitration any time Greyhound does something the Union does not like. That is a right the Union was unable to win at the bargaining table, assuming it ever tried. It is a right which other unions have been able to obtain. See, for example, the status quo provision contained in the labor contract involved in *Detroit News. Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872, 878 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). The acquisition of that right should be left to the collective bargaining process. See App. B, pp. 20-21.

Court did not intervene to enforce the dispute settlement procedures of the collective bargaining agreement. Instead, its preliminary injunction directly controlled the parties' primary conduct and in fact granted preliminarily the very relief which only the arbitrator could grant permanently.

That is an extraordinary judicial intervention into a labor dispute, and it could be justified only by an extraordinary situation, which is not present here. (Part A, above) What makes this case even more remarkable is that that relief was granted without requiring any showing by the Union that it had a probability of success on the merits before the arbitrator. In fact, the Union lost before the arbitrator. Thus, the preliminary injunction granted the Union a right it did not have where there was no showing that it was even likely that the Union had that right. The Ninth Circuit's opinion, which condones that result, is contrary to fundamental principles of equity and to *Boys Markets v. Retail Clerks Union,* 398 U.S. 235 (1970) which incorporates those principles. It is also directly in conflict with the opinion of the Second Circuit in *Hoh v. Pepsico, Inc.,* 491 F.2d 556 (2d Cir. 1974).

Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974) holds that in a Section 301 suit to enjoin an employer from taking action pending arbitration, plaintiff must show "some likelihood of success . . . in obtaining [from the arbitrator] the award in aid of which the injunction is sought." 491 F.2d at 561. Judge Friendly put it this way:

> "[T]he 'ordinary principles of equity' referred to as a guide in the portion of the *Sinclair* dissent that was approved in *Boys Markets* include some likelihood of success. At least this much is required by Judge Frank's liberal formulation in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2 Cir. 1953). We think this must mean not simply some likelihood of

> success in compelling arbitration but in obtaining the award in aid of which the injunction is sought. . . . It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit.
>
> We see little reason to think the unions here have met the requirement of showing some likelihood of ultimate success." 491 F.2d at 561.

Accord, Pittsburgh News. Print. Press. Union No. 9 v. Pittsburgh Press Co., 343 F. Supp. 55 (W.D. Pa. 1972), *aff'd,* 479 F.2d 607 (3d Cir. 1973). That is a plain, ordinary equitable principle. It should have been applied here because *Boys Markets* holds that ordinary equitable principles apply to Section 301 suits. *Boys Markets v. Retail Clerks Union,* 398 U.S. 235, 254 (1970); *Hoh v. Pepsico, Inc.,* 491 F.2d 556, 561 (2d Cir. 1974).

The Ninth Circuit declined to follow the language of *Boys Markets* and Judge Friendly's decision in *Hoh.* It concluded that "a plaintiff . . . seeking to maintain the status quo pending arbitration pursuant to the principles of *Boys Market,* need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor." (App. B, p. 18) It held that the *Steelworkers' Trilogy* dictated a "partial lowering" of the barrier "to obtain a preliminary injunction to maintain the status quo pending arbitration." (App. B, p. 17) That reading of the *Trilogy* is directly in conflict with that adopted by the Second Circuit:

> "Although the courts have been directed by the *Steelworkers'* Trilogy . . . to be liberal in construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they

must continue to exercise the sound discretion of the chancellor." 491 F 2d at 561.

Moreover, the *Steelworkers' Trilogy* holds that courts should not become involved in labor disputes. The Ninth Circuit's ruling that a preliminary injunction regulating primary conduct in a labor dispute should be easier to obtain than in an ordinary case is irreconcilably in conflict with that holding.

Whether a probability of success before the arbitrator must be shown before one can obtain an injunction which grants preliminarily the relief which only the arbitrator can grant permanently is an important issue of labor-management relations upon which this Court has never ruled. This Court should grant the Petition with respect to the third Question Presented to decide that issue and to resolve the conflict between the Ninth and Second Circuits.

D. A District Court Should Not Issue Such a Preliminary Injunction Without Conditioning the Bond to Call for Payment Upon the Union's Losing Before the Arbitrator.

The Ninth Circuit refused to condition the bond to call for payment upon the Union's losing on the merits before the arbitrator. Thus the Ninth Circuit rule is that a union may obtain from a court the very relief which only the arbitrator is supposed to give, then lose on the merits before the arbitrator and leave the company without a remedy on the bond. That is unfair because one who wins on the merits ought to win on the bond. That is the general rule; one who is enjoined preliminarily but who ultimately prevails on the merits had a right to do what the preliminary injunction prevented him from doing; therefore he has been "wrongfully enjoined," and he may recover on the

injunction bond. *Arkadelphia Milling Co. v. St. Louis S.W. Ry.*, 249 U.S. 134, 144 (1919).

In the ordinary case the court decides the merits; in a Section 301 case the arbitrator decides the merits. Therefore, in a Section 301 case a defendant should recover on the bond if he prevails on the merits before the arbitrator.[10] This case demonstrates the obvious unfairness of the contrary result. Greyhound prevailed in the arbitration and now has no recourse on the bond for the damages it suffered by being restrained from doing that which under the Agreement it had a perfect right to do.

The Ninth Circuit's refusal to adopt the ordinary[11] rule stems from its belief that to do so would "fly in the face of our earlier holding that a showing by the plaintiff of probable success in the arbitration is not necessary to obtain a *Boys Market* preliminary injunction." (App. B, p. 22) That is a classic non sequitur. If a court order prevents an employer from taking action which he had a right to take, then he has been wrongfully restrained. The fact that the

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10. *Local 757 v. Budd Co.*, 345 F. Supp. 42, 46-47 (E.D. Pa. 1972) and *United Steelworkers v. Blaw-Knox Foundry & Mill Machinery, Inc.*, 319 F. Supp. 636, 641 (W.D. Pa. 1970) adopt that rule in Section 301 cases. Language from *Hoh v. Pepsico, Inc.*, 491 F.2d, 556, 560-61 n. 8 (2d Cir. 1974) suggests that this is also the rule in the Second Circuit. ("Counsel candidly stated that he could afford no assurance that the unions could post a bond *adequate to protect the employer against losses if the arbitrator should rule against the unions.*") The opinion of the Third Circuit in *United States Steel Corp. v. United Mine Workers*, 456 F.2d 483, 488 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972) is consistent with that of the Court below.

11. The Court cited Rule 65(c), Fed. R. Civ. P. in support of its result (App. B, p. 21). That rule, however, states that an injunction bond should be conditioned to be payable upon a finding that a party has been "wrongfully enjoined or restrained." One who ultimately wins on the merits has been "wrongfully enjoined or restrained." See text.

Ninth Circuit has lowered the normal equitable barriers to make it easier to obtain that restraint does not make the restraint any less wrongful, and therefore it should not deprive the employer of his ability to recover on the bond for the damages which that wrongful restraint caused.

If the opinion of the Ninth Circuit is permitted to stand, it seems likely that practically every time an employer does something a union does not like and which is subject to arbitration, the union will ask a federal district court to enjoin that action pending arbitration. Pursuant to the lowered barriers which that opinion establishes, it will be easy for a union to obtain such an injunction; but even if the union is unsuccessful, it will have lost nothing by the attempt. If the union is successful, it will run virtually no risk, because even if it loses on the merits it will have no liability on the bond to the employer for the damages which the preliminary injunction has caused. That is bad equity; it is also bad labor law because it will result in ever-increasing judicial involvement in arbitrable labor disputes.

The conditions on which a labor injunction bond becomes payable in a case such as this have never been passed upon by this Court. This Court should pass upon that issue now because it is an important, undecided issue with respect to the relationship between courts and arbitrators; because that issue is integrally interrelated with the questions raised by the first three Questions Presented; and because the opinion below announces an unjust and unsound principle.

CONCLUSION

Petitioners respectfully pray that this Court grant a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: April 27, 1976.

Respectfully submitted,

OWEN JAMESON
DAVID M. HEILBRON
RICHARD C. BRAUTIGAM
McCUTCHEN, DOYLE, BROWN & ENERSEN

Attorneys for Petitioner
Greyhound Lines, Inc.

(Appendices Follow)

Appendix A

United States District Court
Northern District of California

No. C-75-1092 WHO

AMALGAMATED TRANSIT UNION, DIVISION 1384, AFL-CIO; and THE AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS, AFL-CIO,

Plaintiffs,

vs.

GREYHOUND LINES, INC., a corporation,

Defendant.

ORDER GRANTING PRELIMINARY INJUNCTION

[June 20, 1975]

Plaintiffs, Amalgamated Council of Greyhound Divisions, AFL-CIO ("the Council") and Amalgamated Transit Union, Division 1384 ("Division 1384"), brought this action to enjoin defendant, Greyhound Lines, Inc. ("Greyhound"), from implementing certain proposed changes in the weekly work cycle of bus drivers within the jurisdiction of Division 1384. An evidentiary hearing was held on June 17, 1975, and oral argument was heard on June 19. The Court having considered the testimony of witnesses, the affidavits on file in this matter, and the written and oral argument of counsel, grants the application for a preliminary injunction for the reasons hereinafter indicated.

The Council is a labor organization representing bus drivers and other persons employed by defendant through-

out the United States, including California, for the purpose of collective bargaining. It is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. § 152(5). The Council is comprised of numerous locals, including Division 1384. Members of Division 1384 are employed by Greyhound in the states of Oregon and Washington and in British Columbia, Canada. It is also a labor organization within the meaning of 29 U.S.C. § 152(5).

Greyhound is a national corporation licensed to carry on business within the State of California and is an employer in an industry affecting commerce within the meaning of Sections 2(2) and 2(7) of the Act, as amended, 29 U.S.C. § 152(2), (7).

Plaintiffs and defendant have for many years been parties to a series of collective bargaining agreements covering Greyhound employees who work in the Western United States. The extant agreement ("the Agreement") between the parties contains provisions for the peaceful resolution of disputes: plaintiffs are prohibited from striking, defendant is barred from conducting a lockout, and the parties are compelled to resolve all disputes through a grievance procedure, the last step of which is final and binding arbitration.

On April 17, 1975, defendant notified Division 1384's business agent that it intended to change the weekly work cycle for certain bus runs in the Pacific Northwest effective June 25. The weekly work cycle ("the cycle") is the term used to describe the ratio between a driver's number of days of work and his or her number of days off per scheduling period. Specifically, Greyhound sought to change its bus runs from 6 days on, 3 days off and 4 days on, 3 days off cycles to a 5 days on, 2 days off cycle. A week later, Division

1384 notified Greyhound by mail that the changes could not be effectuated without the consent of the union pursuant to Section 43 of the Agreement.[1]

On May 22, 1975, Division 1384 suggested by letter that the proposed changes violated not only Section 43 of the Agreement, but Section 100 as well.[2] The letter proposed that the dispute be arbitrated prior to the implementation of the change, but Greyhound countered that although arbitration was the proper forum for resolution of the disagreement, such arbitration need not precede the changeover. Accordingly, Greyhound refused to accede to the union's proposal that the *status quo* be maintained pending arbitration.

Greyhound drivers "bid" for their runs on a yearly basis pursuant to Section 47 of the Agreement, and bidding this year opened in late May and continued until June 7. Because defendant had announced the proposed change in the cycle prior to the opening of bidding and had refused to maintain the *status quo* pending arbitration, drivers bid on 5 on, 2 off runs rather than on runs scheduled under the existing cycle. The bidding is now closed, and new runs have been assigned.

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1. Section 43 provides in pertinent part:
"RUN SET UPS—Insofar as possible, regular runs will be assigned five (5) days per week or ten (10) days in fourteen (14) days. This section can be modified to conform to local conditions upon written mutual consent by the Union and the Company."

2. Section 100 provides in pertinent part:
"EXISTING COMPANY RULES. It is agreed that all existing rules and regulations relating to operation and conduct of Company's business not in conflict with provisions of this Agreement shall remain in effect until superseded or changed by subsequent rules and regulations not in conflict with this Agreement. The Company agrees that they [sic] will not change any rule or regulation that affects the employees beneficially without mutual agreement."

Plaintiffs filed this action on June 2, 1975, in an attempt to enjoin the implementation of the new run schedule pending arbitration. Section 301(a) of the Act, 29 U.S.C. § 185(a). After a brief hearing on plaintiffs' motion for a temporary restraining order on June 4, I declined to issue such an order on the ground that no injunctive relief was then necessary since the bidding was nearly completed, and the new cycle was not scheduled to go into effect for three weeks. The parties filed additional memoranda and affidavits, and the evidentiary hearing followed.

Neither side disputes the propriety of arbitration of this matter; the disagreement lies in the timing of the arbitration—i.e. before or after the cycle change is implemented.

The initial legal issue raised is whether plaintiffs must demonstrate a likelihood of success in obtaining the award in aid of which the injunction is sought. Of course such a showing is a prerequisite to the issuance of injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure (*King v. Saddleback Junior College District*, 425 F.2d 426 (9th Cir. 1970)), but the law is unsettled as to the desirability of such a requirement in cases brought under Section 301. The resolution of this problem is tied to the cloudy relationship between Section 301 and Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107. The tension between those seemingly conflicting provisions was noted and discussed in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), and a resolution of the problem was attempted. The *Sinclair* resolution was reconsidered in *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), however, and was found to be deficient. In *Boys Markets* (at 254) the Court set forth principles to be considered by district courts in determining whether to grant injunctive relief in Section 301 cases.[3] The

3. Although *Boys Markets* arose in the context of management seeking to enjoin labor, the principles enunciated therein apply equally to cases like the instant one where labor seeks to enjoin management. See, e.g., Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974).

quoted factors were first proposed by Mr. Justice Brennan in his dissent in *Sinclair*:

> "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 370 U.S. at 228.

In *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974), the court opined that the *Boys Markets* adoption of the *Sinclair* dissent reference to the "ordinary principles of equity" indicated that the Supreme Court required a showing of some likelihood of success in Section 301 injunction cases. I see no reason to follow *Hoh* in a reading of *Boys Markets* which I feel goes against the spirit of that opinion. The Supreme Court in the *Steelworkers' Trilogy*, 363 U.S. 564, 574, 593 (1960) and in *Boys Markets* stressed the desirability of arbitration as a means of resolving labor disputes. See also, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Referring matters to an arbitrator rather than thrusting such disputes on federal district courts offers

labor and management a forum before a person or a panel of persons intimately familiar with labor relations law and often with the particular industry—if not with the parties themselves—as well. Thus, courts have long deferred to the expertise of the arbitrator and the wisdom of the parties in choosing the arbitration process.[4]

To determine which party is likely to succeed on the merits from the mass of conflicting evidence adduced by affidavits and oral testimony in this case would, in effect, decide the case on the merits. The interpretation of Sections 43 and 100 of the Agreement—on which the parties are in total disagreement—is properly the function and the task of the arbitrator.

I am not unaware of the plight of management in the case of totally frivolous disputes by labor aimed solely at stalling a management program, and agree with Judge Friendly's statement in *Hoh* that:

> "[i]t would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitable was *plainly without merit.*" (Emphasis added.) Id. at 561.

The claim herein, however, is one which the parties agree is arbitable, and I find that it is clearly one which is not "plainly without merit".[5]

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4. This type of a situation differs from a suit under Section 301 of the Act directed at the enforcement of a collective bargaining agreement. See, e.g., *Hribar Trucking, Inc. v. Teamsters Chauf. & Help. Loc. No. 43,* 379 F.Supp. 993 (E.D. Wis. 1974).

5. The gist of the dispute over the interpretation of Section 43 revolves around the need for "written mutual consent" to the alteration of run schedules. I note that Greyhound executive Dale Stucker could not recall a single instance in the past fifteen years when a cycle change had been effectuated in the absence of such mutual consent.

Section 7 requires a district court to make specific findings prior to issuing injunctive relief. Several courts in addition to *Hoh* have held that *Boys Markets* did not invalidate the Section 7 findings requirement in Section 301 cases. *North American Coal Corp. v. Local Union 2262, U.M.W. of Am.,* 497 F.2d 459, 464 (6th Cir. 1974); *Detroit Newspaper Publishers Ass'n v. Detroit Typo. Union,* 471 F.2d 872, 875 (6th Cir. 1972), *cert. den.* 411 U.S. 967 (1973). Accordingly, a district court issuing injunctive relief must make findings that (1) the petitioning party will suffer more from the denial of the sought after relief than the responding party would suffer from its issuance; and (2) the threatened conduct by the defendant will cause irreparable injury to the plaintiff.

Although *Hoh* also held that a district court must follow the Section 7 requirement of hearing "the testimony of witnesses in open court" (491 F.2d at 560; *Railway Labor Exec. Ass'n. Bro. of Loc. Eng. v. Patton,* 500 F.2d 34, 36 (6th Cir. 1974)), I need not decide whether this is or should be the rule in all Section 301 injunction cases, because the conflicting affidavits filed in support of and in opposition to the injunction sought herein rendered it necessary to hear oral testimony on the irreparable injury and balance of harm issues.

The testimony elicited from union and management witnesses at the evidentiary hearing established that Greyhound will suffer some economic harm, the amount of which cannot now be determined, if it is enjoined from effectuating the cycle changes on June 25. Much of this loss of revenue will result from Greyhound's inability to achieve the savings in salary and fringe benefit payments that will be the end product of the cycle change. On the other hand, the parties have been operating under the present 6 on, 3 off

and 4 on, 3 off arangement in the Pacific Northwest since the early 1960's, and this scheduling has not worked an economic hardship on the company.

Much testimony was devoted to the question of whether any drivers would lose their jobs or be forced to move from their homes as a result of the cycle change. It established, despite plaintiffs' earlier predictions of doom, that no driver will suffer either of the above consequences pending arbitration. Members of Division 1384 will suffer considerable harm from the cycle changeover, however. Whether or not a driver will be able to retain a regularly scheduled route or will be relegated to the "extra board",[6] and whether or not the eight drivers who switched from regular routes to the extra board did so voluntarily, all drivers in Division 1384 who previously worked 6 on, 3 off and 4 on, 3 off cycles will have to work 5 on, 2 off cycles if the change is implemented. This is significant.

Eugene Gambrel, a 61 year-old driver with 33 years of Greyhound service, testified that he now puts in a 44-hour week on his 4 on, 3 off, Seattle to Portland run. His weekday evenings consist of a late dinner and an early bedtime in anticipation of the next day's draining schedule. The first day of his three-day respite is spent in pursuit of unwinding from the previous four and in an attempt to prepare himself to be fit enough to enjoy the next two days. If his cycle is changed to 5 on, 2 off, he will be compelled to work a 55-hour week. This, he contends, he will barely be able to do; but he will do it because he needs to maintain his salary level in order to take advantage of the company pension that awaits him four years hence. He will be compensated

6. Duties of extra board drivers include: replacing regular route drivers on the latters' scheduled days off, filling in for regular route drivers who are ill or are on vacation, and taking charter assignment when the occasion arises.

for this extra day of travail—in fact his salary may, as Greyhound points out, increase some 25%—but he maintains that the increase in compensation will not justify the increase in the expenditure of his energy. Plaintiffs, as the chosen representatives of all the drivers within Division 1384, similarly reject the additional salary because of an unwillingness to accept the additional work.

It may well be that Greyhound is entitled under the Agreement to change the work cycle and that Mr. Gambrel and others will have to work a 5 on, 2 off schedule. But that is the decision reserved for the arbitrator. Thus, I find that not enjoining Greyhound from implementing the schedule changes pending arbitration would harm plaintiffs much more than issuing the injunction would harm Greyhound.

The next question is whether the taking of 11 hours per week from the lives of plaintiffs' members—albeit a taking accompanied by just compensation—would result in irreparable injury to them. The precedents are sparse, but they reinforce my conclusion that the changeover here would cause irreparable injury. In *Letter Carriers, Branch 998 v. U.S. Postal Service*, 88 LRRM 3524 (M.D. Ga. 1975), irreparable injury was found in a situation much like the instant one. The court there noted that the elimination of existing postal routes and the consolidation of others would, of necessity, result in the disruption of the extant working schedules of the union members. In *International Brotherhood of Electrical Workers, Local 1245 v. Pacific Gas and Electric Company*, C-74-2537 (Dec. 6, 1974), Judge Harris of this Court enjoined the implementation of a plan to change the work week of certain of PG&E employees from Monday through Friday to Tuesday through Saturday. Finally, in the ultimate case, *Letter Carriers, Branch 352 v. U.S. Postal Service*, 88 LRRM 2678 (S.D. Iowa

1975), the court found that the elimination of a ten minute daily wash-up period constituted irreparable injury, and enjoined the Postal Service from eliminating it pending arbitration.

Finally, Greyhound contends that injunctive relief should be denied because the six weeks that elapsed between the time that plaintiffs received notice of the proposed change and the time this action was filed indicates that plaintiffs "failed to make every effort to settle [the] dispute either by negotiation or with the aid of • • • voluntary arbitration". 29 U.S.C. § 108. Regardless of whether Section 108 applies to Section 301 injunctions, an issue I do not reach, I find that plaintiffs did make sufficient efforts to settle this matter, first by suggestion and negotiation and then by a proposal for expedited arbitration (even though the Agreement had no such mechanism). This conduct is not comparable to that of the plaintiff unions in *Hoh v. Pepsico, Inc., supra.* There, despite some six weeks of notice before management's challenged action (a shutdown), the union failed to take any action even though an expedited arbitration process was available. The lawsuit was filed only two days before the implementation date. 491 F.2d at 558-559, 561-562.

Accordingly, I hereby enjoin Greyhound from implementing the proposed change in the present weekly work cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement. This preliminary injunction shall issue upon plaintiffs giving security, approved by the Court or the Clerk of the Court, in the sum of ten thousand dollars ($10,000) for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction.

The above shall constitute the Court's Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure and 29 U.S.C. § 107.

Dated: June 20, 1975.

WILLIAM H. ORRICK, JR.
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 75-2776

AMALGAMATED TRANSIT UNION, DIVISION 1384
and THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,
Plaintiffs and Appellees,
vs.

GREYHOUND LINES, INC., a corporation
Defendant and Appellant.

OPINION

[January 30, 1976]

Appeal from the United States District Court
for the Northern District of California

Before: HUFSTEDLER, KILKENNY and SNEED, Circuit Judges.

SNEED, Circuit Judge:

Appellant Greyhound Lines, Inc. (Greyhound) appeals the issuance of a preliminary injunction under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, on behalf of the Amalgamated Transit Union, Division 1384, AFL-CIO, and the Amalgamated Council of Greyhound Divisions, AFL-CIO (Union). We affirm.

Greyhound notified the Union on April 17, 1975 that effective June 25, 1975 it planned to change the work cycles of bus drivers operating the Vancouver-Seattle and Seattle-Portland runs from their existing cycles of six days on, three days off, and four days on, three days off, respectively, to a straight weekly regimen of five days on and two days off. The Union objected, arguing that such a change could not be made unilaterally under the terms of the collective bargaining agreement (agreement). Greyhound responded that its action was authorized.[1] On May 22, 1975 the Union requested, in writing, immediate arbitration and maintenance of the status quo pending arbitration. Greyhound agreed to immediate arbitration but refused to refrain from making the scheduled changes pending arbitration. Rather than proceed to arbitration, the Union petitioned the federal district court to enjoin Greyhound from implementing the changes pending resolution of the matter through arbitration.

In its order granting the Union's petition for a preliminary injunction the district court indicated that to obtain a preliminary injunction the Union was not required to make

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1. The dispute concerns the interpretation of the following sections of the agreement:

> § 43. RUN SET UPS—Insofar as possible, regular runs will be assigned five (5) days per week or ten (10) days in fourteen (14) days. This section can be modified to conform to local conditions upon written mutual consent by the Union and the Company.
>
> • • • •
>
> § 100. EXISTING COMPANY RULES—It is agreed that all existing rules and regulations relating to the operation and conduct of Company's business not in conflict with provisions of this Agreement shall remain in effect until superseded or changed by subsequent rules and regulations not in conflict with this Agreement. The Company agrees that they will not change any rule or regulation that affects the employees beneficially without mutual agreement.

"a showing of some likelihood of success", as suggested in *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). The court found the proper standard to be that the Union show that the position it would assert in arbitration was not "plainly without merit". Both of these "standards" are phrases found in the same paragraph of the opinion in *Hoh v. Pepsico, Inc., supra.*[2] The district court held that the Union's position which it would assert in arbitration was "not plainly without merit." Moreover, it found that a denial of the preliminary injunction would harm the Union more than Greyhound would suffer from its being granted, and that Greyhound's work cycle changes would cause irreparable injury to the Union and at least some of its members.

As a result of these findings of fact and conclusions of law the district court enjoined Greyhound from implementing the proposed changes pending a decision by arbitration and conditioned the issuance of the injunction upon the Union "giving security, approved by the Court or the

2. This paragraph of *Hoh* reads as follows:
"Furthermore, the ordinary principles of equity referred to as a guide in the portion of the Sinclair dissent that was approved in *Boys Markets* include some likelihood of success. At least this much is required by Judge Frank's liberal formulation in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2 Cir. 1953). We think this must mean not simply some likelihood of success in compelling arbitration but in obtaining the award in aid of which the injunction is sought. Although courts have been directed by the Steelworkers' Trilogy, 363 U.S. 564, 574, 593, 80 S.Ct. 1343, 1347, 1358, 4 L.Ed.2d 1403, 1409, 1424 (1960), to be liberal in construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they must continue to exercise the sound discretion of the chancellor. It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit." 491 F.2d at 561.

Clerk of the Court, in the sum of ten thousand dollars ($10,000) for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction."

Greyhound moved to increase the amount of the bond, to require it to cover attorneys fees, and to require that the bond be conditioned so that payment on it would be called for upon an arbitration award in favor of Greyhound. The lower court raised the bond to $15,000 but denied Greyhound's motion in all other respects.

Greyhound makes the following arguments in this appeal: (1) the proper showing for the issuance of a preliminary injunction pursuant to § 301 of the LMRA is a "reasonable likelihood of success", not a showing that a claim is not "plainly without merit"; (2) having to work a five day week for compensation is, contrary to the lower court's finding, not irreparable injury; (3) regardless of the merits of the issuance of the injunction, the amount of the bond set was inadequate; (4) the bond should have been conditioned to call for payment on the Union's losing on the merits before the arbitrator; (5) the bond should have covered attorneys fees incurred by Greyhound in defending against the injunction as provided in § 7 of the Norris LaGuardia Act,[3] 29 U.S.C. § 107.

3. Section 7 provides in pertinent part:
No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

I.

Showing Necessary For A Section 301 Injunction.

In *Boys Market Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970) the Supreme Court recognized that, notwithstanding the anti-injunction provisions of the Norris La Guardia Act,[4] 29 U.S.C. 101 et seq., injunctive relief under section 301 of the Labor Management Relations Act[5] is available when (1) the collective bargaining agreement contains a mandatory arbitration clause, (2) the underlying dispute is arbitrable, (3) the party seeking the injunction is ready and willing to arbitrate, and (4) injunctive relief is warranted under ordinary principles of equity.[6]

Greyhound's initial contention is that under the circumstances of this case injunctive relief is *not* warranted under the ordinary principles of equity. It admits that in all other respects the conditions established in *Boys Market*

4. Section 4 of the Norris LaGuardia Act provides in part:
No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
• • • •

5. Section 301 of the LMRA (29 U.S.C. § 185(a)) provides:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of the controversy or without regard to the citizenship of the parties.

6. *See generally*, Note, *Federal Labor Policy and the Scope of the Prerequisites for a Boys Market Injunction*, 19 St. Louis L.J. 328 (1975).

have been met. More particularly, Greyhound argues the ordinary principles of equity require that the Union establish that there is a "reasonable likelihood of success" in having its position in the arbitration proceedings accepted by the arbitrator. Presumably Greyhound's position is derived from those authorities which hold that the issuance of a preliminary injunction in an ordinary case requires a showing by the party seeking relief that there is a reasonable probability that he ultimately will prevail on the merits. *See* 7 Moore's Fed. Practice ¶65.04[1]. Rule 65, Fed. R. Civ. P., normally embraces such a requirement.

The district court was correct in rejecting this contention by Greyhound. The *Steelworkers' Trilogy*, 363 U.S. 564, 574, 593 (1960), and *Boys Market*, by emphasizing the importance of arbitration to stable labor-management relations, indicate that an effort to obtain a preliminary injunction to compel arbitration stands on a somewhat different footing than does an effort to secure an injunction in the ordinary case. The importance of arbitration justifies a partial lowering of the barrier to obtaining the injunction.[7]

The *extent* to which the barrier should be lowered in a case involving an effort to obtain a preliminary injunction to maintain the status quo pending arbitration is a difficult matter. The district court appears to have believed that a standard of "some likelihood of success", as that phrase was used in the paragraph of *Hoh* set forth in the margin,[8] is

7. Adjustments of the barrier have occurred in other settings. *See, e.g.*, Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp., 443 F.2d 867, 871 (2d Cir. 1971) (injunction pendente lite in patent suit unavailable except when patent is beyond question valid and infringed).

8. *See* note 2, *supra*.

higher than the standard "plainly without merit" also appearing in the quoted paragraph. That Judge Friendly, the author of the paragraph, intended barriers of different height is by no means clear. A reasonable interpretation is that "plainly without merit" is the negative form of a standard, the affirmative form of which is "some likelihood of success". Under this view Judge Friendly was merely illustrating the standard "some likelihood of success" when he described the inequity of issuing preliminary injunctions pending arbitration when the petitioner's claims in arbitration were "plainly without merit."

In our view it is not necessary for us to resolve this dispute about what Judge Friendly meant. We hold that a plaintiff, without regard to whether he is the employer or the union, seeking to maintain the status quo pending arbitration pursuant to the principles of *Boys Market,* need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor. If there is a genuine dispute with respect to an arbitrable issue, the barrier we believe appropriate has been cleared.

Although the standard "not plainly without merit" employed by the district court differs in focus from that which we have enunciated, our review of the record convinces us that in this case arbitration will not be a futile endeavor and that a genuine dispute with respect to an arbitrable issue exists. Moreover, we are mindful that the issuance of a preliminary injunction inescapably involves the exercise of discretion by the trial court and should not lightly be disturbed on appeal. *See* 7 Moore's Fed. Practice, ¶ 65.04 [2], 65-49.

II.

Irreparable Injury.

It is obvious that a lowering of the barrier regarding the showing that a plaintiff must make with respect to the merits of the controversy serves to increase the intensity of disputes between the plaintiff and defendant regarding the scope of the injury that either granting the injunction will impose on the defendant or denying it will thrust upon the plaintiff. This increased intensity provides a strong reason why we embrace the position that section 7 of the Norris LaGuardia Act, insofar as it precludes the issuance of a temporary or permanent injunction "except after hearing the testimony of witnesses in open court", is applicable to proceedings to obtain preliminary injunctions pursuant to section 301 of the Labor-Management Relations Act. In this we join an impressive array of authorities. *See Hoh v. Pepsico, Inc.,* 491 F.2d 557 (2d Cir. 1974); *United States Steel Corp. v. United Mine Workers of America,* 456 F.2d 483 (3d Cir. 1972); *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union,* 471 F.2d 872, 876 (6th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973); *Emery Air Freight Corp. v. Local Union 295,* 449 F.2d 586, 588-89 (2d Cir. 1971), *cert. denied,* 405 U.S. 1066 (1972). We recognize, of course, that there may be circumstances where the undisputed facts so clearly indicate that injunctive relief is necessary that "hearing the testimony of witnesses in open court" would be useless. Such circumstances did not exist in this case and probably will exist only infrequently. It follows that the trial court acted properly in conducting a hearing in which the testimony of witnesses was received in open court.

We also hold, and for like reasons, that the requirement of section 7 of Norris LaGuardia that there be a finding of fact "that as to each item of relief granted greater injury will be inflicted upon the complainant by the denial of relief than will be inflicted upon defendants by the granting of relief" is applicable to efforts to obtain a *Boys Market* injunction pursuant to section 301 of the LMRA. Quite properly the district court recognized this obligation and made such findings. We cannot say that its finding "that not enjoining Greyhound from implementing the schedule changes pending arbitration would harm plaintiffs much more than issuing the injunction would harm Greyhound" is clearly erroneous.

It is, of course, also necessary that a plaintiff show that the denial of the preliminary injunction will cause irreparable injury to him. *See Boys Market Inc. v. Retail Clerks Union Local 770, supra* at 254; *cf.* Norris LaGuardia Act, section 7(b), 29 U.S.C. § 107. The district court in this case made such a finding and, although we adjure trial courts not to treat inconvenience to a few union members as the irreparable injury required by ordinary principles of equity, we are not prepared to say that this finding is clearly erroneous, or that the issuance of the preliminary injunction was an abuse of discretion. Our reminder to treat "irreparable injury" as a meaningful requirement springs from our awareness that eliminating any requirement to show probable success in the arbitration proceedings increases accessibility to preliminary injunctions and, in the type of case here before us, further limits the opportunity of the employer to make changes in work rules pending arbitration. Maintenance of the status quo in all cases pending arbitration may be bargained for by the union and agreed to by the employer. Its equivalent should not be

derived from *Boys Market*. Treating irreparable injury as a significant requirement, even when the union is the plaintiff seeking the injunction, will tend to preclude this result.

III.

The Conditions of the Bond.

Greyhound's contention that the bond should have been conditioned to call for payment on the Union's losing on the merits before the arbitration is not supported by authority. Surety bonds required by reason of Rule 65(c), FED. R. CIV. P., are conditioned on "payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." This means what it says. As Moore puts it, "Recoverable damages under the bond are those that are directly attributable to the restraining order or injunction, as the case may be, and which are incurred or suffered by a party as a result of the wrongful restraint, and does not include damages occasioned by the suit independently of an injunction granted therein." 7 MOORE'S FED. PRACTICE, ¶ 65.10[1], 65-96, 97. Wright and Miller are in accord. 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2973 (1973).

The pertinent language of section 7(e) of the Norris LaGuardia Act is not significantly different from that of Rule 65(c). It provides that the amount of the bond shall be sufficient "to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such an order or injunction." We agree with the court in *United States Steel Corporation v. United Mine Workers of America, supra* at 488, when it held that the bond in a *Boys Market* proceeding was payable "only if the preliminary injunction is found to have been improv-

idently or erroneously issued, that is, where the court did not hold a proper hearing or failed to make the factual determination mandated by Part V of the *Boys Market* opinion, or where the court erroneously issued a preliminary injunction over a labor dispute not covered by the contract grievance-arbitration provision." To accept Greyhound's contention that the bond should be payable in the event it wins the arbitration would fly in the face of our earlier holding that a showing by the plaintiff of probable success in the arbitration is not necessary to obtain a *Boys Market* preliminary injunction.

We, however, do believe that Greyhound is correct in asserting that the bond could embrace reasonable attorneys fees as a part of the costs secured. Such fees are permitted under section 7(e) of the Norris LaGuardia Act and also were permitted by the court in *United States Steel Corporation v. United Mine Workers of America, supra* at 488, at the request of the union in a *Boys Market* proceeding. The union suggests that *Mine Workers* be read to limit inclusion of reasonable attorneys fees to instances in which a union is being enjoined. Although it is well-known history that the Norris LaGuardia Act was enacted to protect labor from anti-labor courts, we decline to use that history to justify an unevenhanded treatment of reasonable attorneys fees incurred in defending against an erroneous issuance of a preliminary injunction.

Nonetheless, having held that the preliminary injunction was properly issued the failure of the bond to include reasonable attorneys fees in this case imposed no injury or hardship on Greyhound.

AFFIRMED.